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In the
Texas Court of Criminal Appeals
At Austin

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COURT OF CRIMINAL APPEALS
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No. 01-20-00859-CR
In the
Court of Appeals for the
First District of Texas
At Houston

No. 1685846
In the 230th District Court
Of Harris County, Texas

EX PARTE MICHAEL LOWRY

STATE'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT GRANTED

STATEMENT REGARDING ORAL ARGUMENT

This Court has granted oral argument.

IDENTIFICATION OF THE PARTIES

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Trial Court Judge:

Honorable Chris Morton

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

Appellant was charged by indictment with possession of lewd visual material depicting a child. He filed a pretrial application for writ of habeas corpus in which he claimed that Texas Penal Code Section 43.262 is facially unconstitutional. (CR – 4-24, 59-79)[1] After the trial court denied habeas relief, appellant filed notice of appeal in the underlying criminal case and in the separately docketed habeas proceeding. (CR – 82-83; CR Supp. II – 5; RRII – 7-8)

On October 26, 2021, a panel of the First Court of Appeals issued a published opinion reversing the trial court's denial of habeas relief and remanding the case for the trial court to dismiss the indictment. *Ex parte Lowry*, 639 S.W.3d 151, 169 (Tex. App.—Houston [1st Dist.] 2021, pet. granted). The panel dismissed the appeal filed in the underlying criminal case for lack of jurisdiction. *Id.* A motion for rehearing was not filed. This Court granted the State's petition for discretionary review.

[1] "CR" refers to the clerk's record. "CR Supp. II" refers to the second supplemental clerk's record filed in the court of appeals on October 19, 2021. "RR" refers to the reporter's record.

ISSUES PRESENTED

1) Did the court of appeals err in finding that Texas Penal Code Section 43.262 is a content-based regulation of protected speech that fails strict scrutiny?

2) Did the court of appeals err in considering Texas Penal Code Section 43.262's constitutionality under the First Amendment overbreadth doctrine?

3) Did the court of appeals err in its overbreadth analysis of Texas Penal Code Section 43.262?

STATEMENT OF FACTS

Appellant was charged with knowingly possessing visual material that depicts the lewd exhibition of the pubic area of a clothed child who is younger than 18 years of age at the time the visual material was created, the material appeals to the prurient interest in sex, and the material has no serious literary, artistic, political, or scientific value. Appellant filed a pretrial application for writ of habeas corpus on grounds that Texas Penal Code Section 43.262 is unconstitutional because (1) it regulates a substantial amount of protected speech that is not obscene or child pornography, and (2) it is vague. (CR – 4-24)

Following a hearing, the trial court found that the statute is a content-based regulation of speech. (RRII – 5) The court agreed that the State has a compelling interest in protecting minors from sexual exploitation and found that the visual material proscribed by the statute is patently offensive conduct. (RRII – 5-6) The trial court found that the statute met the requirement of scienter. (RRII – 7)

Ultimately, the court found that the statute is narrowly construed and necessary to serve a compelling state interest and denied habeas relief. (RRII – 7) The trial court also denied habeas relief on appellant's vagueness issue. (RRII – 7-8)

SUMMARY OF THE ARGUMENT

Texas Penal Code Section 43.262 does not run afoul of the First Amendment. The statute should be considered an expansion of the State's criminalization of child pornography. Even if Section 43.262 is found to apply to protected speech, the statute satisfies strict scrutiny. The court of appeals erred in examining Section 43.262 under the First Amendment overbreadth doctrine because appellant did not preserve that challenge. Even if appellant had preserved a challenge to the statute under the overbreadth doctrine, the court of appeals erred in its overbreadth analysis. As a result, the court of appeals erred in finding Section 43.262 unconstitutional.

ARGUMENT

Texas Penal Code Section 43.262 provides that a person commits an offense if the person knowingly possesses, accesses with intent to view, or promotes visual material that:

(1) depicts the lewd exhibition of the genitals or pubic area of an unclothed, partially clothed, or clothed child who is younger than 18 years of age at the time the visual material was created;

(2) appeals to the prurient interest in sex; and

(3) has no serious literary, artistic, political, or scientific value.

Tex. Penal Code § 43.262(b).

The statute defines "promote," "sexual conduct," and "visual material." *Id.* §§ 43.262(a); 43.25(a)(2), (a)(5); 43.26(b)(3). The statute also provides that it is not a defense to prosecution that the depicted child consented to the creation of the visual material. Tex. Penal Code § 43.262(d).

Section 43.262 was enacted in 2017 in order to criminalize possession or promotion of what the Legislature labeled "child erotica images." *See* Act of May 19, 2017, 85th Leg., R.S., ch. 350, § 1, eff. Sept. 1, 2017; S. Research Ctr., Bill Analysis, Tex. H.B. 1810, 85th Leg., R.S. (2017). The Legislature described child erotica images as portraying "an unclothed, partially, [sic] clothed, or clothed child depicted in a sexually explicit manner indicating that the child has a willingness to engage in sexual activity." S. Research Ctr., Bill Analysis, Tex. H.B. 1810, 85th Leg., R.S. (2017). As further reported,

> [i]nvestigations of child pornography cases have revealed many child pornography collections also include child erotica images. In some cases, only child erotica images are discovered. In such instances, state charges cannot be pursued [because current state law does not contain statutes that criminalize possession or promotion of such materials]. H.B. 1810 seeks to address this issue by creating the offense of possession or promotion of lewd visual material depicting a child.

Id.

On appeal, the panel confined its analysis to the portions of the statute implicated in appellant's indictment—knowing possession of visual material that depicts the lewd exhibition of the pubic area of a clothed child who is younger than 18 years of age at the time the visual material was created, appeals to the prurient interest in sex, and has no serious literary, artistic, political, or scientific value. *Lowry*, 639 S.W.3d at 161.[2] The panel held that said portion of Section 43.262: (1) does not apply to obscenity or child pornography, (2) is a content-based restriction of protected speech that fails strict scrutiny, and (3) is overbroad. *Id.* at 161-69. As a result, the court of appeals held that the portion of 43.262 addressed is void on its face. *Id.* at 169.

I. The court of appeals erred in holding that Section 43.262 is a content-based regulation of protected speech that fails strict scrutiny.

An appellate court reviews *de novo* a challenge to the constitutionality of a statute. *Vandyke v. State*, 538 S.W.3d 561, 570 (Tex. Crim. App. 2017). In a facial challenge, courts consider the statute only as written rather than how it operates in practice. *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908 (Tex. Crim. Ap. 2011). While courts may not rewrite a statute that is not readily subject to a narrowing construction, the federal constitution affords the states broad authority to construe a

[2] The State's references to Section 43.262 in this brief are also confined to the portions of the statute under which appellant is charged.

statute narrowly to avoid a constitutional violation. *State v. Johnson*, 475 S.W.3d 860, 872 (Tex. Crim. App. 2015).

A statute is interpreted in accordance with the plain meaning of its language unless the language is ambiguous or leads to absurd results that the Legislature could not have intended. *See Wagner v. State*, 539 S.W.3d 298, 306 (Tex. Crim. App. 2018). Words and phrases must be read in context and construed according to the rules of grammar and usage. *Id*. Reviewing courts presume every word has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible. *Id*. If the language of the statute is plain, reviewing courts will effectuate that plain language without resort to extra-textual sources. *Id*. However, if the plain language would lead to absurd results or is ambiguous, reviewing courts may review extra-textual resources to discern the legislative intent underlying the statutory language. *Id*.

A. Section 43.262 applies to child pornography.

The First Amendment does not prohibit criminalization of child pornography. *New York v. Ferber*, 458 U.S. 747, 765-66 (1982); *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). In concluding that states are entitled to greater leeway in the regulation of pornographic depictions of children, the *Ferber* Court recognized that a state's interest in safeguarding the physical and psychological well-being of a minor is compelling. *Ferber*, 458 U.S. at 756-57. *Ferber* also

recognized that distribution of images depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children because (1) the images are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation, and (2) the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. *Id.* at 759.[3] So important are the interests involved in protecting victims of child pornography that the Court later held that states may also proscribe possession and viewing child pornography. *Osborne*, 495 U.S. at 108-11.

The *Ferber* Court held that New York's child-pornography law sufficiently described material that is unprotected speech subject to content-based regulation. *Id.* at 765 & n.18. However, the majority in *Osborne* remarked in dictum that the distinction in Ohio's child-pornography statute between body areas and specific body parts is not constitutionally significant. *See Osborne*, 495 U.S. at 114 n.11 ("The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks").

[3]The Court also supported its holding by determining that: (1) advertising and selling child pornography provide an economic motive for and are thus an integral part of the production of such materials; (2) the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*; and (3) designating child pornography as a category of material outside of First Amendment protection is not incompatible with the Court's earlier decisions. *Id.* at 761-64.

In line with the majority's thinking in *Osborne*, many states have enacted laws prohibiting depictions of children engaged in sexually explicit conduct that was not proscribed by the New York statute at issue in *Ferber*. For example, several states proscribe images involving exhibition of body parts other than the genitals.[4] Some states also proscribe visual material that depicts the exhibition of body parts through less than complete or fully opaque clothing. *See* 720 Ill. Comp. Stat. Ann. 5/11-20.1(a)(1)(vii), (a)(6) (West 2022); N.J. Stat. Ann. § 2C:24-4(b)(1) (West 2021); S.C. Code Ann. §§ 16-15-375(6), 16-15-410(A) (2022); Utah Code Ann. §§ 76-5b-103(1), (8), (10), 76-5b-201(1) (West 2022); Wis. Stat. Ann. §§ 948.01(1t), (7), 948.12 (West 2021); *see also State v. Bolles*, 541 S.W.3d 128, 140-43 (Tex. Crim. App. 2017) (discussing and applying *Dost*[5] factors—only one of which regarding whether a photographed child is fully or partially clothed or nude—to determine whether an image depicted the lewd exhibition of a child's genitals); *cf. United States v. Knox*, 32 F.3d 733, 744, 751 (3rd Cir. 1994) (op. on remand) (finding prior version of federal child-pornography statute, which

[4] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 13-3551(5), 13-3553(A)(2) (2022); Ark. Code Ann. §§ 5-27-302(4), 5-27-304(a)(2), 5-27-601(15), 5-27-602(a)(2) (West 2022); Conn. Gen. Stat. Ann. §§ 53a-193(13), (14), 53a-196f(a) (West 2022); 11 R.I. Gen. Laws Ann. § 11-9-1.3(a)(4), (c)(1), (c)(6)(v) (West 2022); S. D. Codified Laws §§ 22-24A-2(2), (16), 22-24A-3 (2022); Tex. Penal Code §§ 43.26(a)(1), 43.25(a)(2); Utah Code Ann. §§ 76-5b-103(1), (10)(e), 76-5b-201(1) (West 2022); Wash. Rev. Code Ann. §§ 9.68A.011(4)(f), 9.68A.070(2)(a) (West 2022); W. Va. Code Ann §§ 61-8C-1(c)(10), 61-8C-3(a) (West 2022); Wyo. Stat. Ann. § 6-4-303(a)(ii), (a)(iii), (b)(iv) (West 2022).

[5] *United States v. Dost*, 636 F.Supp. 828 (S.D. Cal 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), *and aff'd*, 813 F.2d 1231 (9th Cir. 1987).

proscribed lascivious exhibition of the genitals or pubic area, did not require that the child's genitals or pubic area be exposed or discernible through opaque clothing).

The court of appeals determined that Section 43.262 does not apply to child pornography because: (1) the statute does not expressly state that it prohibits child pornography, (2) the legislative history describes proscribed material as "child erotica," (3) the material proscribed is not considered "sexual conduct" under the existing child-pornography statute, and (4) possession of child erotica was not a crime in Texas before the statute was enacted. *Lowry*, 639 S.W.3d at 163-64. In short, the panel determined that materials proscribed under Section 43.262 cannot be child pornography because Section 43.262 does not apply to material already proscribed by Texas's existing child-pornography statute. This reasoning does not comport with the principles described in *Ferber*.

The scope of child pornography is not without bounds. *See Ferber*, 458 U.S. at 764 ("[T]here are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment"). Instead, conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. *Id.* at 764. The category of sexual conduct proscribed must also be suitably limited and described. *Id.* Section 43.262 meets *Ferber*'s requirements. The legislature enacted Section 43.262 to close a loophole of child

sexual exploitation and abuse left open by the state's existing criminal statutes. *See* S. Research Ctr., Bill Analysis, Tex. H.B. 1810, 85th Leg., R.S. (2017). The statute proscribes visual depictions of children engaged in a specific, suitably limited range of sexual acts. As a result, the statute is properly considered an expansion of Texas's ban on child pornography. The court of appeals erred in concluding otherwise.

B. Even if Section 43.262 is not limited to child pornography, the statute survives strict scrutiny.

Under strict scrutiny, a conduct-based regulation of expression may be upheld only if it is narrowly drawn to serve a compelling government interest. *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014). A regulation is narrowly drawn if it uses the least restrictive means of achieving the government interest. *Id*. However, the First Amendment requires that a regulation be narrowly tailored, not that it be perfectly tailored. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454 (2015).

The appellate court acknowledged that protecting children from sexual exploitation is a compelling government interest. *Lowry*, 639 S.W.3d at 166; *see Ferber*, 458 U.S. at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"); *Ex parte Lo*, 424 S.W.3d 10, 20-21 (Tex. Crim. App. 2013). But the panel erroneously

rejected the contention that images proscribed by Section 43.262 are sexually exploitive or abusive of children. *Lowry*, 639 S.W.3d at 166-67.

The appellate court considered the legislative history silent as to whether visual material depicting the lewd exhibition of the pubic area of a clothed child is an actual problem causing the sexual abuse or exploitation of children, thus necessitating the prohibition. *Id.* at 167. But Section 43.262 does not proscribe visual material merely because it depicts the lewd exhibition of a child's clothed pubic area. Proscribed materials must also appeal to the prurient interest in sex and lack serious literary, artistic, political, or scientific value. Images that satisfy all of Section 43.262's elements are necessarily sexually exploitive or abusive. A photograph that depicts the lewd exhibition of a clothed four-year-old child's pubic area, appeals to the prurient interest in sex, and has no serious literary, artistic, political, or scientific value is nothing if not sexually exploitive.

Relying on *Brown*, the appellate court also emphasized that the State did not present evidence to show (1) that the images prohibited in Section 43.262 have a direct causal link to the State's compelling interest of preventing the sexual abuse or sexual exploitation of children, or (2) how child erotica images cause sexual exploitation and sexual abuse of children. *Id.* at 167-68; *see Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011). But the regulation in *Brown* involved special labeling restrictions on the sale or rental of violent video games to

minors. *Brown*, 564 U.S. at 789, 799. The harm to be prevented in *Brown* was the exposure of children *to* violent video games. *Id*. at 799. By contrast, the harm prevented by Section 43.262 is the exposure of children *in* sexually explicit depictions. As discussed above, an image that meets all of the elements of Section 43.262 is sexually exploitive or abusive. *See* S. Research Ctr., Bill Analysis, Tex. H.B. 1810, 85th Leg., R.S. (2017); *Ferber*, 458 U.S. at 759 (distribution of images depicting sexual activity by juveniles is intrinsically related to child sexual abuse). Thus, the insufficient nexus between the government's purpose and its statute in *Brown* is inapplicable here.

To the extent that the lower court's opinion suggests that Section 43.262 is not necessary to serve the compelling interest of protecting children from sexual exploitation, the plain language of the statute and legislative history states otherwise. Section 43.262 applies to—and was created to criminalize—sexually explicit depictions of children that are not subject to Section 43.26. Tex. Penal Code § 43.262; S. Research Ctr., Bill Analysis, Tex. H.B. 1810, 85th Leg., R.S. (2017). Thus, a contention that Section 43.262 fails strict scrutiny because it is not necessary to achieve a compelling government interest is incorrect.

Section 43.262 was enacted to in order to criminalize sexual exploitation and abuse of children permitted by existing Texas statutes. For the same reasons discussed above that materials subject to the statute are necessarily sexually

exploitive or abusive, Section 43.262 is also narrowly tailored to achieve the State's compelling interest. Notably, a few states have statutes that are similar to Section 43.262, but the scope of materials proscribed by those statutes is not as narrow as that of Section 43.262. *See* 720 Ill. Comp. Stat. Ann. 5/11-23(a-10) (West 2022) (possessing graphic information with pornographic material); Nev. Rev. Stat. Ann. §§ 200.700(4), 200.730 (West 2021) (possession of visual presentation depicting person under 16 years old as the subject of a sexual portrayal); 11 R.I. Gen. Laws Ann. § 11-9-1.6 (West 2021) (child erotica prohibited); W. Va. Code Ann. § 61-8C-3a (West 2022) (prohibiting child erotica).

Section 43.262 is necessary and narrowly tailored to achieve the compelling interest of protecting children from sexual abuse and exploitation. Therefore, the statute survives strict scrutiny and the court of appeals erred in concluding otherwise.

II. The court of appeals erred in addressing an overbreadth challenge that appellant did not preserve.

A. The First Amendment overbreadth doctrine is not interchangeable with other constitutional challenges.

The First Amendment overbreadth doctrine is a distinct type of facial challenge in which a challenger may succeed in challenging a law that regulates speech if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. *Wagner*, 539 S.W.3d at 310. The

overbreadth doctrine enables a litigant to benefit from the statute's unlawful application to someone else. *See Johnson*, 475 S.W.3d at 865. In this type of facial challenge, the burden is always on the challenger to demonstrate from a statute's text and actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally. *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016). The overbreadth doctrine is strong medicine to be employed with hesitation and only as a last resort. *Wagner*, 539 S.W.3d at 310.

The overbreadth doctrine is distinct from a constitutional challenge on the ground that a statute is insufficiently tailored to achieve a purported State interest. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 381 n.3 (1992) (contrasting a technical "overbreadth" claim—i.e., a claim that a regulation violates the rights of too many third parties—with a claim that a statute is "overbroad" in the sense of restricting more speech than the Constitution permits, even as to the challenger, because it is content based); *Thompson*, 442 S.W.3d at 349 (treating scrutiny and overbreadth analyses separately); *Martinez v. State*, 323 S.W.3d 493, 498-99, 504-507 (Tex. Crim. App. 2010) (noting that defendant's claim that a statute improperly restricted his right to free speech was labeled improperly as an "overbreadth" claim); *see also Thompson*, 442 S.W.3d at 344-49 (describing factors and application of scrutiny tests).

The overbreadth doctrine is also distinct from a vagueness challenge—i.e., a claim that a statute's prohibitions are not sufficiently defined. *See Wagner*, 539 S.W.3d at 313-14. Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2008); *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression; otherwise the doctrines would be substantially redundant).

Although they may at times take similar considerations into account, these three constitutional challenges are not interchangeable. They implicate different constitutional rights, address different questions, employ different tests, and can involve different party burdens. *See, e.g.*, *Williams*, 553 U.S. at 304; *Wagner*, 539 S.W.3d at 310-14; *Perry*, 483 S.W.3d at 902; *Thompson*, 442 S.W.3d at 344-51; *Martinez*, 323 S.W.3d at 504-508. As a result, a trial-level complaint regarding a scrutiny analysis or a vagueness complaint does not preserve an appellate argument regarding the overbreadth doctrine.

B. Preservation requires a sufficiently specific complaint and a ruling.

To preserve a complaint for appellate review, the record must show that a specific and timely complaint was made to the trial judge and that the trial judge ruled on the complaint. Tex. R. App. P. 33.1(a); *Lovill v. State*, 319 S.W.3d 687,

691 (Tex. Crim. App. 2009). The complaining party bears the responsibility of clearly conveying to the trial judge the particular complaint, including the precise and proper application of the law as well as the underlying rationale. *Pena v. State*, 285 S.W.3d 459, 463-64 (Tex. Crim. App. 2009).

While no hyper-technical or formalistic use of words is required to preserve error, a challenger must still let the court know what he wants, why he thinks he is entitled to it, and do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012); *see also Resendez v. State*, 306 S.W.3d 308, 313 (Tex. Crim. App. 2009) (when context shows that a party failed to effectively communicate his argument, error is deemed forfeited on appeal). Whether a party's particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial. *Pena*, 285 S.W.3d at 464. In making this determination, appellate courts are to consider the context in which the complaint was made and the parties' shared understanding at that time. *See id*.

Specificity is also important in the pretrial writ context because appellate courts only review issues that were properly raised and addressed in the trial court. *See Ex parte Leachman*, 554 S.W.3d 730, 739 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd); *Ex parte Perez*, 536 S.W.3d 877, 880 (Tex. App.—Houston [1st

Dist.] 2017, no pet.); *see also* Tex. Code Crim. Proc. art. 11.05 (appellate courts cannot issue or grants writs of habeas corpus).

C. Appellant did not preserve a challenge under the First Amendment overbreadth doctrine and the court of appeals erred in finding otherwise.

The court of appeals found that appellant preserved an overbreadth challenge because (1) his application argued that the statute restricts more speech than the constitution permits and violated the rights of too many third parties, (2) he argued the statute was "overbroad" at the hearing, and (3) the State argued that the statute was not overbroad at the hearing. *Lowry*, 639 S.W.3d at168 n.16. But this conclusion does not accurately reflect the entire record.

In his pretrial writ application, appellant claimed that Section 43.262 is unconstitutional because it "regulates a substantial amount of protected speech (speech which is neither obscene nor child pornography)" and "is unconstitutionally vague." (CR – 4) Although his writ application included some terms and phrases related to an overbreadth challenge, appellant did not make the trial court aware of a complaint that Section 43.262 prohibits a substantial amount of protected speech in relation to its legitimate sweep. (CR – 7-20; RRI – 5-11, 18-19) Instead, his argument was that Section 43.262 is a content-based regulation of protected speech that is not sufficiently tailored. (CR – 7-20)

At the pretrial writ hearing, appellant continued to argue that the statute is a content-based restriction of protected speech that fails strict scrutiny. (RRI – 5-11, 18-19) Appellant repeatedly disagreed with the contention that he had the burden to establish the statute's overbreadth. (RRI – 6-7, 9, 18) His argument that Section 43.262 leaves too many people open to prosecution was made in the context of his vagueness challenge. (RRI – 8-9) Further, he made clear that "[o]ur argument is that this statute cannot pass strict scrutiny. That's all it is." (RRI – 11) In rebuttal to the State's arguments at the hearing, appellant reiterated

> [w]e agree that there's a compelling interest in protecting children, but that's not the problem here. The problem is that this law is not narrowly drawn. It's not the least restrictive way to protect children. We don't have the burden to show it's—it's too broad. The State needs to prove it's narrowly broad [sic]. We've shown how it's not.

(RRI – 18)

In denying habeas relief, the trial judge found that Section 43.262 is content based and subject to strict scrutiny. (RRII – 5) The judge found that the statute's terms describe patently offensive conduct and concluded that the statute is narrowly construed and necessary to serve a compelling state interest. (RRII – 6-7) After appellant requested an additional ruling on the vagueness ground of his argument, the trial court denied relief on that ground as well. (RRII – 7-8) In making his ruling, the trial judge did not reference the First Amendment overbreadth doctrine in name or in substance. (CR Supp. II – 5; RRII – 5-8) The

court of appeals did not suggest that the trial court made a finding regarding the overbreadth doctrine. *See Lowry*, 639 S.W.3d at 158; *compare with Ex parte Nuncio*, No. PD-0478-19, __S.W.3d__, 2022 WL 1021276, at *4 (Tex. Crim. App. Apr. 6, 2022) (finding that the trial court understood and ruled on a challenge under the overbreadth doctrine, where the order noted that the court considered the merits of defendant's request that portions of a statute be struck down "as constitutionally and legally invalid, overbroad").

Considering the entire context of appellant's complaints and the trial court's ruling, the record does not support the appellate court's finding that appellant preserved an overbreadth argument. Any potential reference to the overbreadth doctrine in the writ application was expressly refuted by appellant at the hearing when he insisted his argument was that the statute fails strict scrutiny. (RRI – 6-7, 11, 18) *Cf. Perry*, 483 S.W.3d at 902 (stating that the burden is always on the party raising a challenge under the overbreadth doctrine); *Gillenwaters v. State*, 205 S.W.3d 534, 537-38 (Tex. Crim. App. 2006) (in preservation analysis, considering whether any reasonable judge would have understood defendant's motion, in context, to be asserting vagueness and overbreadth complaints).

The record reflects that appellant did not make a sufficiently specific claim that Section 43.262 is unconstitutional under the First Amendment overbreadth doctrine. The record also shows that the trial court did not rule on a claim

regarding the overbreadth doctrine. As a result, court of appeals erred in addressing Section 43.262's constitutionality under the overbreadth doctrine because appellant did not preserve that challenge and the trial court did not address it. Tex. R. App. P. 33.1; *see Leachman*, 554 S.W.3d at 739.

III. The court of appeals erred in finding Section 43.262 overbroad.

Even if this Court determines that appellant preserved a challenge under the First Amendment overbreadth doctrine, the court of appeals erred in its overbreadth analysis. An appellate court cannot strike down a statute as overbroad unless a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep. *See Wagner*, 539 S.W.3d at 312; *see Perry*, 483 S.W.3d at 902. As discussed above, the burden is always on the challenger to show that a statute is overbroad. *Perry*, 483 S.W.3d at 902. Further, the danger that a statute will be unconstitutionally applied must be realistic and not based on fanciful hypotheticals. *Id*.

The panel determined that Section 43.262 is a criminal prohibition of "alarming breadth." *Lowry*, 639 S.W.3d at 168-69. In so finding, the court of appeals relied on appellant's contention that a number of child Instagram influencers are in violation of the statute, and that the State is attempting to prosecute Netflix for exhibiting a moving depicting children performing

gymnastics. *Id.*[6] As discussed above, the panel erroneously rejected the contention that Section 43.262 is limited to material that satisfies the definition of child pornography. Even if said visual material is not considered child pornography, all of the statute's elements narrow its scope of potential application significantly. But as it did in its strict-scrutiny analysis, the panel failed to give due consideration to all of Section 43.262's elements in conducting its overbreadth analysis. Specifically, the panel failed to give proper credence to the elements that prohibited material must appeal to the prurient interest in sex and lack literary, artistic, political, or scientific value. *See id.* at 169 (stating that the statute applies to any person who knowingly possesses visual material depicting the lewd exhibition of a clothed child's pubic area); *id.* (stating that the savings-clause exemptions matters little when a substantial amount of protected speech is still chilled in the process).

The court of appeals relied in part on appellant's contention that many teenagers are depicted in photographs in which they wear suggestive clothing and are posed in a sexually suggestive manner, they are clothed in photographs that

[6] The court of appeals also noted that the statute could apply not only to Netflix, but to those persons who viewed the offending material. *Lowry*, 639 S.W.3d at 169. However, because the panel's analysis was limited to the portions of the statute under which appellant was charged—i.e., possession of material—the court's comments regarding hypothetical individuals who access with intent to view materials is beyond the issue presented in this case. *See id.* at 161; *Thompson*, 442 S.W.3d at 350-51 (examining portion of statute under which defendant was charged); *Perry*, 483 S.W.3d at 904 (limiting review to the portion of statute subsection alleged in the indictment).

appeal to the prurient interest and lack serious societal value, or they are clothed in photographs that are seductive. (CR – 12-14, 16-17, 19; Appellant's Br. – 8, 21-24, 26) But like the appellate court, appellant did not give proper credence to all of Section 43.262's elements in making his argument. The statute does not proscribe photographs of clothed children that are merely seductive or sexually suggestive. The statute does not apply to all photographs of clothed children that appeal to the prurient interest in sex and have no serious value. Instead, Section 43.262 is expressly limited to knowing possession of visual material that depicts the lewd exhibition of a specific part of a clothed child where the material also appeals to the prurient interest in sex and has no serious literary, artistic, political, or scientific value. Tex. Penal Code § 43.262(b).

The court of appeals also relied on appellant's argument that the State is attempting to prosecute Netflix for exhibiting a movie depicting children performing gymnastics. *Lowry*, 639 S.W.3d at 168-69. The panel further noted that the statute applies to any person, including law enforcement, judiciary, school administrators, and teenagers who take offending photos of themselves. *See id.* at 169. However, the court of appeals did not examine whether any potential, realistic applications of Section 43.262 to depicted children, individuals who forward proscribed material to law enforcement, or parties who investigate and prosecute offenses under the statute educators, would be substantial in relation to

the statute's legitimate sweep. Although an unconstitutional statute will not be upheld merely because the Government promises to use it responsibly, a challenger still has the burden to show that any impermissible applications of the statute are both real and substantial judged in relation to the statute's legitimate sweep. *See United States v. Stevens*, 559 U.S.460, 480 (2010); *Thompson*, 442 S.W.3d at 350; *Perry*, 483 S.W.3d at 902. Further, the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. *Williams*, 553 U.S. at 303. Instead, where a statute is not overbroad, potentially impermissible applications of the statute should be the subject of an as-applied challenge. *See id*. at 302-303.

Even if the court of appeals was permitted to address an overbreadth challenge, the court failed to identify the true legitimate sweep of Section 43.262. The appellate court also failed to consider whether any potential unconstitutional applications of the statute are real and substantial judged in relation to that legitimate sweep. As a result, the court of appeals erroneously held that Section 43.262 is overbroad.

PRAYER FOR RELIEF

It is respectfully requested that this Court reverse the decision of the lower appellate court, hold that Texas Penal Code Section 43.262, as limited by the charging instrument, does not violate the First Amendment, and remand the case for the court of appeals to address appellant's remaining point of error.

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